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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CURTIS GIBSON, Defendant and Appellant.	B207480 (Los Angeles County Super. Ct. No. BA305875)

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis B. Rappe, Judge. Affirmed.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Curtis Gibson, also known as Kahllid Alalim, was convicted of multiple crimes, due to a confrontation with Officers Jaime Luna, Erik Shear, Alfred Corso and Drew Gontram of the Los Angeles Police Department. The felonies included assault on a peace officer, as to Luna (count 1); attempting to take a firearm from a peace officer, as to Gontram (count 9); and resisting an executive officer in the performance of duty, as to Shear (count 2 and 5), Luna (counts 3 and 6), Corso (count 7), and Gontram (count 8). There also was one misdemeanor, resisting a peace officer, Luna (count 4).

After a diagnostic study by the Department of Corrections and Rehabilitation, appellant was sentenced to five years of formal probation.

Appellant contends that (1) there was prejudicial prosecutorial misconduct during the testimony of the witness Richard Cox and in final argument, (2) the jury should have heard that the officers had counsel present when detectives questioned them about their use of force during the incident, (3) the jury should not have heard about appellant's prior arrest for refusing to show identification to a police officer during a traffic stop, and (4) there was cumulative error.

We find no prejudicial error and affirm.

FACTS

About 9:00 p.m. on June 19, 2004, Officers Shear and Luna were driving in their patrol car near a large apartment complex on 10th Avenue where members of the Rolling 60's Crips gang (Rolling 60's) were known to reside or congregate. Shear had learned at a briefing session that there was a block party in the area that day, but he did not associate the party with the apartment complex.

The two officers observed that a man, later identified as Jabbar Thomas, was standing with a group of people near the apartment complex's driveway. Thomas looked toward the patrol car, threw down a cup, and walked quickly toward the building's entrance. The officers stopped the patrol car and started to get out. Thomas looked back at them and ran into the apartment complex, grabbing at his waistband with his right hand. The officers thought he was a gang member who was running into the building with a gun. They radioed for assistance and pursued him. They ran down a walkway,

through a gate, past the front door, and along a 20-foot entryway or tunnel. Luna, who ran ahead of Shear, pulled out his service pistol as he entered the tunnel. He carried it in a "low ready" position.

On the other side of the tunnel, the officers discovered that they were inside a courtyard in which about 80 people were having a party. Thomas, who now visibly held a pistol, ran into the crowd and disappeared from their view. Officer Luna holstered his gun. People in the crowd cursed at the officers, complained that they were interrupting the party, and demanded them to leave. Some of the people displayed gang hand signs. About half of them looked like gang members. For safety reasons, the officers backed out of the courtyard.

Where the tunnel opened into the courtyard, Officer Shear was approached by a very large man, later identified as William Bryson. Bryson was about six feet tall and 300 pounds. Shear was 5 feet 11 inches and weighed 175 pounds. Officer Luna was slightly smaller than Shear. Bryson cursed at the officers and repeated the complaints that had been made in the courtyard. He also asked Shear why he had taken his gun out. Shear did not know that Luna's gun had been out. Shear had not taken his own gun out and said so to Bryson.

After conferring with each other, the two officers walked outside the complex, just beyond the gate, and again called for backup. Bryson came through the gate and approached them, holding a plastic cup, and repeating the type of statements he had made before. Officer Shear told Bryson to relax, stay back, and not approach so closely. When Bryson came very near, Shear said, "Get out of my face." He could smell alcohol on Bryson's breath. Because Bryson appeared to be both drunk and belligerent, Shear put his hands on Bryson's chest and pushed him back. Looking shocked, Bryson stepped back a few feet and spilled his drink on himself. Officer Luna again radioed for assistance.

At that point, appellant came out of the gate, behind Bryson. Appellant was approximately five feet six to eight inches tall and weighed between 160 and 175 pounds. He held a clear bottle that was shaped like a beer bottle and resembled bottles that hold

"Zima" or "Smirnoff." He was wearing baggie clothing and speaking profanities, so Officer Shear thought he might be a gang member. Appellant paced back and forth while telling Bryson, "This is fucking bullshit. Don't let him do that to you. What the fuck. This is a party." Prodded by appellant's words, Bryson walked slowly toward Shear while saying, "I should beat your ass for that, you don't put your hands on me."

Both officers were carrying cans of pepper spray, which temporarily effects vision. Officer Luna quietly told Officer Shear that he was going to use that substance on Bryson. When Bryson came close, Luna sprayed him in the face with pepper spray, without much effect. When Bryson stepped toward Shear again, Shear sprayed Bryson, and "got him good." Bryson held his face. The officers decided to arrest him for threatening Shear. They told him to turn around and put his hands behind his back. He did not comply with those instructions, refused to get down on the ground for handcuffing, and grabbed Shear's pepper spray. The officers recovered the pepper spray and pulled Bryson to the ground. Shear then began to handcuff Bryson.

Angry people were standing near the officers on both sides of the gate. They cursed at the officers, tried to get close to them, and told them to leave Bryson alone. Appellant was the loudest and most aggressive of the protesters. He yelled profanities and threats, jumped up and down, displayed a fighting stance, and repeatedly approached and then backed away from the officers.

The last time appellant approached, Officer Luna pepper sprayed him. Appellant backed up quickly. Luna bent down and gave his set of handcuffs to Officer Shear, as two sets were necessary for a person of Bryson's size. At that moment, appellant threw the bottle he was holding, as if he were tossing a baseball. The bottle hit Luna on the side of the head at the hairline, fell to the ground, and bounced. It caused a half-inch cut that did not require stitches.[1]

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[1] Count 1 charged assault on an officer with force likely to produce great bodily injury. It was based on the throwing of the bottle. The bottle was not recovered after the incident. There was conflicting testimony about whether the bottle was made from glass or plastic. The jury found appellant guilty of a lesser included offense, assault on a peace officer.

Many of the events were recorded on video by a resident of the apartment complex. Some of the video was made into a DVD that included individual frames. The jury at the trial was therefore able to watch portions of the incident.

After appellant threw the bottle, he remained nearby and continued to yell at Officers Shear and Luna, who now were standing inside of the gate. Shear grabbed Bryson and started to drag him outside the gate, to increase visibility for the backup officers. A police vehicle with a sergeant inside drove up at that point. Shear and Luna left Bryson with the sergeant and chased appellant, who had turned and run into the apartment complex.

Appellant ran through the courtyard, up a staircase to the third floor, along the third floor, and down another staircase to the ground floor. He stopped running outside of apartment No. 1. What happened next was captured on the video.

Appellant clung to the door frame of apartment No. 1 and tried to go inside. Someone inside the apartment tried to push him out. Officers Luna and Shear tried to pull him out. Officers Corso and Gontram arrived at that moment. Gontram was two weeks out of the police academy. Luna yelled to Corso, "Help me. Help me. This guy hit me with a bottle." Corso and Gontram joined Luna and Shear in pulling on appellant. Hostile people stood nearby, cursing at the officers and telling them to let appellant go.

Another officer, Hal Jones, arrived with his partner. Jones told the bystanders to get back and stay inside. The person who least heeded those orders was Richard Cox, who appears prominently on the video.

The pulling and pushing in the doorway of apartment No. 1 ended when Officer Gontram struck appellant in the wrist with his flashlight. Appellant and the four officers crashed to the ground together. Appellant landed on his stomach, and his head hit the pavement. He aggressively resisted and tried to push himself up. The four officers struggled to place him in a position for handcuffing. They held him down with their body weight and knees, and Officer Corso struck him in the leg with a flashlight.

The situation escalated when Officer Gontram felt a tugging in his belt area and saw appellant's hand on his (Gontram's) gun. Gontram yelled, "He's got my gun, he's

got my gun." Within a few seconds, Gontram pried the gun from appellant's hand and moved that hand behind appellant's back. Gontram did not announce that appellant no longer had the gun. Officers Corso and Shear had heard Gontram's yell and had seen appellant's hand on Gontram's gun. Due to the threat of deadly force, Corso pulled out his gun, and Shear forcefully punched appellant four times in the face. Appellant stopped resisting and was arrested. Gontram then observed that appellant had unfastened the top snap of his holster and pulled the gun's hammer halfway back.

While appellant was on the floor with the four officers, Cox remained nearby cursing at the officers. At one point, he approached Officer Luna, who tried to shoot him with pepper spray. Cox assumed a fighting position and lunged at Officer Jones, who was trying to keep bystanders away. Jones struck Cox in the chest, knocking him to the ground. Jones's partner jumped onto Cox and fought with him while Jones hit Cox in the lower back with his baton. Cox stopped resisting and was arrested.

Cox was a prosecution witness at the trial. He explained that he and appellant lived with their families in adjacent apartments on the third floor of the building. There had been a block party earlier that day for "June Teenth," an African-American holiday that celebrates the abolition of slavery. Appellant was one of the organizers of the party, and Cox saw him talking amiably with police officers during the event. Around 9:00 p.m., appellant and Cox decided to drive to a liquor store. Appellant was holding a bottle of water when they left the building. They did not observe the origin of the problems between Bryson and the officers. They became upset when they saw Bryson go down to the ground after scuffling with a police officer. Cox cursed at the officer. Appellant threw his water bottle at the officer, striking him in the shoulder. The rest of Cox's description of the incident was consistent with the police officer witnesses and the video. Following his arrest, he spent a day and a half in custody but was never charged with a crime. Appellant later admitted to Cox that he really did reach for the officer's gun.

Shortly after appellant's arrest, the officers located and arrested Thomas, the gunman who was initially chased into the apartment complex. Thomas belonged to the Rolling 40's gang, which is friendly with the Rolling 60's.

Hours after the incident, Officers Shear, Luna, Gontram and Corso were separately interviewed by the police department's Critical Incident Investigation Division (CIID). Following an investigation, none of the officers was disciplined. Their behavior caused concern in the community. In response, the police department changed its policy about using flashlights as impact devices.

Captain Kenneth Garner was the commanding officer of the 77th Division police station at this time. He talked with appellant during the June Teenth celebration and spoke with Cox at the apartment complex after the incident. Cox told Garner he saw appellant hit one of the officers in the head with a bottle and thought appellant's behavior resulted from the use of alcohol.

There also was evidence that, about a year and a half before the incident, appellant was hostile and combative when two police officers stopped his car for speeding, late at night, near the apartment complex. He refused to show his identification, complained of harassment, tried to walk away, and approached the officers with his fists up. He was pepper sprayed, handcuffed, and arrested for failing to present identification. His identification was then found in his back pocket.

Appellant called no witnesses of his own. His defense was that the officers were lying about his behavior to cover up their own excessive use of force.

DISCUSSION

1. Prosecutorial Misconduct

A prosecutor's misconduct violates the federal Constitution if there is a pattern of conduct that is so egregious that the trial is infected with such unfairness that the conviction constitutes a denial of due process of law. Absent fundamental unfairness under federal law, prosecutorial misconduct violates state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade the court or jury. (*People v.*

Prieto (2003) 30 Cal.4th 226, 260; *People v. Cunningham* (2001) 25 Cal.4th 926, 1000 (*Cunningham*).)

Appellant maintains that there was prejudicial prosecutorial misconduct during the questioning of Cox and in closing argument.

A. Summary of the Problems with Cox's Testimony

Prior to opening statement, the prosecutor told the court and defense counsel that he wanted to tell the jury that Cox made different statements in the past. The prosecutor believed Cox would testify he saw appellant throw the bottle, which is what Cox told detectives prior to the preliminary hearing. At the preliminary hearing, Cox testified that he did not see appellant throw the bottle. When Cox was reinterviewed by detectives after the preliminary hearing, he said he saw appellant throw the bottle and lied about that fact at the preliminary hearing because he had been approached by people in the apartment complex who told him he was a snitch because he talked with the police. He decided that if his preliminary hearing testimony helped appellant, he might not be in trouble with gang members and other people in the community.

The prosecutor also said he would not suggest that appellant personally threatened Cox, but he thought the jury could learn why Cox changed his story at the preliminary hearing, which would show how Cox's testimony evolved. Defense counsel responded that Cox perceived a threat, but there was no actual threat; the people who approached Cox were gang members; and Cox would also say that appellant neither threatened him nor tried to influence his testimony.

The trial court observed that there are two kinds of threat evidence. The prosecution cannot "put in a threat and ask the jury to infer it's from the defendant where there is no connection. [¶] But there is a whole separate area where the witness' credibility is an issue for the jury, whether they're telling the truth at the time they're on the stand, [and] threats or perceived threats are relevant to the witness' credibility." The court ruled that evidence of threats was relevant to Cox's credibility, but it would give a limiting instruction on request. However, the prosecutor was not to mention the subject of threats in opening statement, as a prior statement by Cox would not be relevant unless

Cox testified as a witness and the defense brought out evidence of a prior inconsistent statement.

Consistent with that ruling, the prosecutor's opening statement did not mention threats to Cox or prior statements by him. The prosecutor told the jury that Cox would testify he saw appellant throw a bottle. The opening statement also indicated that the building was known to be a gathering place for the Rolling 60's, but there was no allegation that appellant belonged to that gang.

During the trial, the significant portions of Cox's direct testimony were that (a) he saw appellant throw the bottle at an officer, (b) he saw appellant struggling with the officers outside the apartment, and (c) he later heard appellant admit that he reached for the gun of one of the officers.

Cox also testified, on direct examination, that he was interviewed by detectives, before and after the preliminary hearing, and he told them the truth. He and his family moved to a different location a year after the incident out of worries about the attention he received for speaking with the police. Prior to the preliminary hearing, gang members stood outside his door discussing his family members and the fact he was a witness.

Defense counsel made a hearsay objection at that point. The prosecutor said the questioning explained conduct and did not go to truth. The trial court advised the jury: "Ladies and gentlemen, obviously, you're the judges of the facts in this case and you must make the decisions about witness credibility. [¶] I'm going to allow this testimony not for the truth of what is said but simply as it might help you evaluate the believability of this witness. [¶] Does everybody understand the difference? [¶] In other words, whatever is said is not offered so that you believe the truth of what was said or not but simply insofar as it might affect this witness' demeanor on the stand and credibility and so forth so that's the limitation. [¶] Okay. With that caution."

Cox then testified that statements were made, in his presence, by people who said he "was snitching" by testifying and by talking to the police. He heard the statements "a couple of times" by people who stood outside his screen door while he was inside his apartment when the front door was open. The statements were repeated "[t]he next

couple times" by gang members from the Rolling 60's while he was "actually standing outside with the people."

The prosecutor asked, "And in your opinion based on your experience in the neighborhood how do gang members treat snitches? People they think are snitches?" Defense counsel objected, "No foundation, Your Honor. Calls for speculation." The court permitted the prosecutor to lay a foundation.

Cox said he learned about the gang mentality when he was forced to move to the apartment complex due to financial problems. While he lived there, he always heard that people were not supposed to speak to the police or be witnesses. He had no personal experience with gang retaliation, but he had heard "vaguely" about "threats being made."

Defense counsel again objected that there was no foundation. The prosecutor responded, "I believe it relates to his attitude toward testifying. It should be relevant, Your Honor." The trial court advised the jury, "Ladies and Gentlemen, obviously, this witness is not an expert on gang actions or culture but, again, this whole testimony is being limited simply to any bearing it would have in your evaluating his credibility or believability; therefore, you're not to take this testimony for the truth of what he's stating but simply to show what he believed might happen. [¶] Does everybody understand the distinction? [¶] Okay. With that limitation I'm going to permit it but, again, he's not an expert. It's not coming in for the truth of what he says but simply to show what he believes and how that might affect his testimony."

Defense counsel again complained that there was no foundation. The trial court responded: "As to his believability only I think there is enough to show that he's had enough experience that it could affect his feelings about testifying in this case." The court then further admonished the jury: "And, again, ladies and gentlemen, I want to make clear based on the conversations I've had with counsel it is my belief and I believe it's counsel's belief that there is no connection between Mr. Gibson and what's being said in this witness' presence; correct, counsel?"

The prosecutor agreed that there was no indication that appellant himself urged the people to speak with Cox. The court again instructed, "It's simply limited as to what it might show as to this witness' credibility."

The questioning continued, "*Did you know the defendant's brother?* [¶] A. Just vaguely. [¶] Q. When you say vaguely what do you mean by that so we understand?" (Italics added.) Defense counsel objected under Evidence Code section 352. The trial court sustained the objection. The next testimony was:

"Q. You said that the members of the -- people that you -- people that were Rolling Sixties were making the statements that you have already indicated; is that correct? [¶] A. Yes. [¶] Q. Do you feel that the Rolling Sixties were a group of individuals that were associating together to create a peaceful environment in the community or a violent environment in the community? [¶] A. I would say a violent environment. [¶] How did it make you feel when these were the individuals that were saying things about you?"

Cox gave a narrative answer, indicating, that he was frightened by the threats, especially because his wife and small children lived in that neighborhood. Defense counsel again objected. The court ruled that there should not be a narrative and specific questions were necessary, to allow objections. The questioning continued:

"To jump a[]head for a moment at some point you testified at this preliminary hearing; is that correct? [¶] A. Yes. [¶] Q. At the preliminary hearing did you tell -- you testified to everything that you had seen that actually occurred on June 19th of '04? [¶] A. Yes, I testified to that, but it was not what happened. [¶] Q. So you changed what happened to help the defendant; is that correct? [¶] A. No. [¶] MR. DOUGLAS [defense counsel]: He's leading, Your Honor. [¶] THE COURT: Sustained. Stricken. Disregard it. [¶] BY MR. STIRLING [the prosecutor]: [¶] Q. Why did you change what happened?" Cox answered that he testified falsely at the preliminary hearing out of fear for his family members.

The prosecutor then asked if Cox's wife had encouraged him not to come to court or not to testify truthfully. Cox said his wife told him he should not have spoken with the

detectives. Prior to the preliminary hearing, nobody said anything specifically about his wife or family members. After the preliminary hearing there were people outside his door, talking about his wife and children. At the time of the preliminary hearing, he feared what might happen if he testified that he saw appellant throw the bottle. Therefore, he testified at the preliminary hearing that he did not see appellant throw it.

The questioning continued: "Okay. Did this person, William Bryson -- you called him Big Will, is that correct? [¶] A. Yes. [¶] Q. Do you know him to be a member of a gang? [¶] A. No. I just know him to be an associate of them. [¶] Q. Okay. *And do you know anyone connected with the defendant to be a member of a gang?* [¶] A. I think his brother is a Rolling Sixty. [¶] Q. This is a brother that lives in the complex? [¶] A. No, he does not live in the complex. [¶] Q. Do you see that brother in the complex? [¶] A. Yes. [¶] Q. On a regular basis or very rarely or somewhere in between? [¶] A. Very rarely." (Italics added.)

At that point, defense counsel approached the bench, controlling his anger with difficulty. He reminded the court that it had sustained an Evidence Code section 352 objection to an earlier question about appellant's brother. Counsel also complained that the prosecutor was not supposed to ask about prior statements. He moved for a mistrial on the ground the prosecutor had polluted the trial, despite diligent defense efforts to insulate appellant from any connection with threats or the Rolling 60's gang.

The prosecutor responded that he thought he could not suggest that appellant personally made or authorized threats, but he could show that appellant's brother was affiliated with the Rolling 60's gang. He did not recall that an objection had been sustained to the subject of appellant's brother. The court said it had just sustained such an objection. It observed, "[T]he only possible relevance of doing anything with the brother beyond just saying a bunch of Rolling Sixties threatening him is to try to get the jury to draw some kind of inference or speculate that the defendant is behind it." The prosecutor thought the fact appellant's brother belonged to that gang was relevant to Cox's state of mind, to show why Cox gave a different version at the preliminary hearing.

The court asked if appellant's brother had ever made any threats. The prosecutor answered, "Not that I know of."

The court denied a mistrial based on a lack of prejudice. Instead, it gave this strong admonition to the jury: "Ladies and gentlemen, the objection to the last question is sustained. You are to disregard [] the questions about the defendant's brother's status. The defendant's brother is not on trial. There is no evidence that that has anything to do with the defendant. You're just simply to consider the evidence relating to this defendant by itself and nothing about his brother is of any concern in this case. It's irrelevant."

Cox then testified that Bryson told him he put his entire family in danger by talking to the police. Cox knew that gang members were gambling in the courtyard when the police officers arrived there. When he testified at the preliminary hearing, he tried to distance himself from giving statements about gang members and the throwing of the bottle by testifying that he did not know how many gang members were in the courtyard and he did not see appellant throw the bottle. He was willing to testify at the trial that appellant threw the bottle because he and his family no longer lived at the apartment complex.

At the end of the trial, the court's instructions included the usual admonitions to disregard stricken evidence and questions and answers to which objections were sustained. The jury was also told that evidence admitted for a limited purpose should be used only for that purpose.

B. Analysis of the Problems with Cox's Testimony

Among the proper subjects for the purpose of a witness's credibility are prior consistent statements, prior inconsistent statements, and the witness's attitude about testifying. (Evid. Code, § 780, subds. (g), (h), (j).)

"Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to [his or] her credibility and is well within the discretion of the trial court." (*People v. Burgener* (2003) 29 Cal.4th 833, 869 (*Burgener*); see also *People v. Navarette* (2003) 30 Cal.4th

458, 507; *People v. Warren* (1988) 45 Cal.3d 471, 481 (*Warren*); *People v. Avalos* (1984) 37 Cal.3d 216, 232; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1587-1588.)

When fear evidence is used for the purpose of credibility, "'[i]t is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible.'" (*People v. Sapp* (2003) 31 Cal.4th 240, 281, quoting *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.)

Cox was not in fear at the time of the trial when he testified that he saw appellant throw the bottle. That is also what he told the detectives before and after the preliminary hearing. The only time he said appellant did not throw the bottle was when he testified at the preliminary hearing, at which time he still lived in the apartment complex and feared gang reprisals.

Respondent argues that the preliminary hearing version was relevant because defense counsel indicated in opening statement that Cox would testify that appellant *did not* throw a bottle. Actually, however, defense counsel told the jury Cox would testify that appellant *did* throw a bottle. The jury had no idea that Cox gave a different version at the preliminary hearing until the prosecutor questioned Cox about that version during direct examination.

Respondent also argues that "sooner or later, the evidence of threats against Cox would have been admitted," because defense counsel asked Cox about the preliminary hearing version during cross-examination. Defense counsel only asked those questions, however, after the prosecutor had already gone into the preliminary hearing version during Cox's direct examination.

If the preliminary hearing version was relevant, it was not because of anything defense counsel did, but because for the limited purpose of credibility, the jury could learn that Cox previously testified falsely, out of fear of gang reprisal, but was now testifying truthfully, because the reason for his fear was gone.

In *Burgener*, *supra*, 29 Cal.4th at page 868, a witness gave detailed testimony at a penalty retrial in 1988, but had been unable to recall some of those details when she

testified at the guilt phase trial in 1981. She explained that she had been afraid to tell the truth in 1981 because the defendant sent her threats at that time via a former jail inmate who was no longer alive at the time of the 1988 proceedings. *Burgener* found that evidence of the threats in 1981 was relevant to explain why the witness gave more details in 1988 than in 1981. Similarly here, under *Burgener*, the jury was entitled to know why Cox gave a different version at the preliminary hearing than at the trial. Therefore, although we view the issue as a close one, we find that the prosecutor could properly ask questions about the preliminary hearing testimony and the threats.

The questions about appellant's brother present a different problem.

Evidence of suppression or attempted suppression of evidence is inadmissible to show the defendant's consciousness of guilt unless there is proof that the defendant was present or authorized the illegal conduct. (*People v. Hannon* (1977) 19 Cal.3d 588, 600, disapproved on another ground by *People v. Martinez* (2000) 22 Cal.4th 760, 762-763; see also *People v. Williams* (1997) 16 Cal.4th 153, 205.) The trial court recognized that principle of law before the trial began. The prosecutor ignored it when he asked about appellant's brother. After the trial court sustained an Evidence Code section 352 objection, the prosecutor later returned to that issue.[2] As the trial court later recognized, it appeared that the prosecutor was trying to link appellant with the threats because appellant's brother belonged to the gang that made the threats. The subject of appellant's brother intruded into the forbidden realm of consciousness of guilt, without any evidence of the necessary link to appellant.

Even so, we find that the improper references to appellant's brother do not justify a reversal of appellant's conviction as they were a small part of the trial rather than an egregious pattern of misconduct, and they did not infect the trial with unfairness because the jury was instructed to disregard the subject of the brother, and it was repeatedly advised that appellant was not linked to the threats.

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[2] Appellant's brief does not identify the location of the prior sustained objection regarding the brother, and respondent was unable to locate it. It appears at page 895 of the reporter's transcript.

Even if we were to assume that the questions about the brother involved deceptive or reprehensible methods, prosecutorial misconduct does not require reversal unless the defendant suffers prejudice. (*Warren, supra*, 45 Cal.3d at p. 480.) There was no prejudice here, not only because of the instructions to disregard the subject but also because of the overwhelming evidence of guilt.

Officers Shear and Luna, as well as appellant's friend Cox, all testified that they saw appellant throw the bottle while the officers were trying to handcuff Bryson. That act by appellant was further corroborated by the videotape that shows appellant throwing an object, the existence of a cut on Luna's head, and the fact Cox told Captain Garner he saw appellant throw the bottle.

Similarly, appellant's resistance to the officers in front of apartment No. 1 was shown on the videotape and was described by the four officers who were involved in the struggle, the additional officer who attempted to keep bystanders away, and Cox.

The fact appellant put his hand on Officer Gontram's gun was observed by Officers Gontram, Shear and Corso, appears on the video, and was confessed to by appellant when he later discussed the incident with Cox.

Therefore, although we do not approve of the questions about appellant's brother, we find that it is not reasonably probable that a result more favorable to appellant would have been reached in the absence of that questioning. (*Cunningham, supra*, 25 Cal.4th at p. 1019; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

C. Alleged Misconduct in the Prosecutor's Closing Argument

In general, a defendant may not complain on appeal of prosecutorial misconduct unless a timely objection and request for admonishment were made. In the absence of an objection, the point is reviewable on appeal only if an admonition would not have cured the harm. If the claim concerns comments by the prosecutor to the jury, the issue is whether there is a reasonable likelihood that the jury construed or applied the comments in an objectionable fashion. (*Cunningham, supra*, 25 Cal.4th at pp. 1000-1001.)

Appellant complains about an assortment of statements in the prosecutor's closing final argument, including many for which no objection was made. He raises no issues

regarding the prosecutor's opening final argument. His complaints do not involve references to gangs, threats, or his brother. He overlooks the fact that the prosecutor was generally responding to issues first raised in defense counsel's argument, such as the pendency of a civil lawsuit against the officers.

Having reviewed appellant's claims of misconduct, we find that (a) when no objection was made, the individual claim is waived on appeal; (b) when no objection was made, there was no valid basis for an objection, so defense counsel did not render constitutionally ineffective assistance by failing to object; and (c) whenever the prosecutor stepped over the line into improper argument, defense counsel objected, and the trial court gave an admonition that cured any harm. We are confident that the verdict in this case was based on the overwhelming evidence of guilt, rather than on anything the prosecutor said during closing argument. Appellant has failed to establish misconduct in closing argument, as there is no reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*Cunningham*, *supra*, 25 Cal.4th at p. 1001.)

2. Limitations on the Cross-examination of Officer Shear

Before the trial, the prosecutor told the court he opposed defense counsel's intention to ask the officers if they had a lawyer present when they were interviewed by the CIID on the day after the incident. Defense counsel explained that the CIID was "a newly formed division that is designed to deal with use of force by L.A.P.D. officers." He wanted to tell the jurors that the officers had a lawyer present during the interviews because if they consulted with the lawyer before the interviews, they had an opportunity to sanitize their statements to avoid allegations of misconduct. In other words, counsel wanted to argue that the presence of a lawyer during the interview justified an inference that the officer's statement was rehearsed.

The trial court decided that there would be an Evidence Code section 402 hearing to determine whether there was a nexus between the presence of the lawyer and what the officer said at the CIID interview.

At the Evidence Code section 402 hearing, Officer Shear said he met with an attorney before the CIID interview, and the attorney was present during the interview, but he did not discuss the substance of the incident with the attorney prior to the interview.

The trial court then found that the requisite nexus was not present, and the probative value of the evidence was very slight, compared to the risk of prejudice. It therefore precluded questions about discussions with counsel before the CIID interview or about the presence of counsel during the interview.

Appellant contends that the trial court's ruling denied him his constitutional right to present a defense under *California v. Trombetta* (1984) 467 U.S. 479, 485, and related cases. There was no objection below on that basis. The trial court made a ruling pursuant to Evidence Code section 352. It had broad discretion to do so. (*People v. Ayala* (2000) 24 Cal.4th 243, 282.) We find no abuse of discretion, as the attorney did not discuss the incident with Officer Shear prior to the CIID interview, so there was no basis for the inference that defense counsel sought to draw from the presence of counsel at the interview.

3. Evidence of Appellant's Prior Arrest

Evidence of a defendant's other crimes is admissible if it is relevant to an issue other than criminal disposition, such as intent and common design or plan. Even if relevant, other crimes evidence is excluded if its probative value is outweighed by the risk of prejudice. (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393, 402-404.)

Prior to the trial, the prosecutor sought to introduce evidence of appellant's behavior prior to his arrest in 2003 for refusing to show identification after he was stopped for speeding. The prosecutor argued that the prior incident was admissible on the issues of common plan or scheme, intent, and motive, as on the prior and present incidents, appellant overreacted to police authority by being combative, refusing to cooperate, and attempting to get away.

Defense counsel responded that the prior incident should be excluded because it was not substantially similar to the present incident, it was more prejudicial than probative, it did not result in a conviction, and appellant denied any criminal conduct.

The trial court ruled that the facts of the 2003 arrest showed sufficient similarity to allow its use on the issues of motive, common plan and scheme. It agreed with the prosecutor that the prior and current incidents showed "a refusal to submit to police authority" and an unusual way of reacting "when confronted by police." It further found that the facts of the traffic incident were not unduly prejudicial. The jury was instructed on the limited purpose for which the evidence of the prior incident could be used.

We agree with the reasoning employed by the trial court. Because of the similar way in which appellant behaved on the prior and present incidents, and the relatively benign nature of appellant's behavior on the prior incident, we find that there was sufficient similarity between the two incidents for the specified limited purposes, and no abuse of discretion under Evidence Code section 352.

4. Cumulative Error

The only contention in which we have found merit concerned the prosecutor's references to appellant's brother. We already found that those references caused no prejudice. We further find that appellant is not entitled to a reversal based on cumulative error.

DISPOSITION

The judgment is affirmed.

FLIER, J.

We concur:

BIGELOW, P. J. LICHTMAN, J*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.